

1 In the Matter of the Arbitration

2 Between

3
4
5
6
7
8
9 Highland Unified School District,

10 And

11 California School Employee's Association,

) CSMCS Case No.: ARB-03-1927

) Arbitrator's Opinion and Award

) Joseph J. Woodford, Arbitrator

12 Issue: Contract Interpretation-Layoff Bumping)

June 7, 2005

13 Rights)

14
15
16
17
18
19
20
21
22
23
24
25
Procedural Background

On June 10, 2003 the Highland Unified School District governing board adopted Resolution No. 02-91 to Issue a Notice of Intent to Lay Off (JX 4). Several months preceding and following that resolution an exchange of correspondence and meetings between representatives of the California School Employees Association (CSEA or Union) and the Highland Unified School District (District) occurred. Those efforts did not resolve the disputes between the Parties giving rise to this arbitration. On August 5, 2003, Jim Dandy, CSEA Labor Relations Representative, filed a level-II grievance with the District. Frank N. Fair, Director of Labor Relations, denied the grievance at level II of the grievance procedure on August 21, 2003. On August 28, 2003 Dandy requested arbitration of the grievance at level III of the grievance procedure. (JX 2) Using the services of the California State Mediation and Conciliation Service, Joseph J. Woodford was selected by the Parties as Arbitrator. On March 31, 2005, at the District's offices the arbitration hearing was held. The hearing was conducted in accordance with Article XVIII of the July 1, 2002 through June 30, 2004 Collective Bargaining Contract (Contract or JX 1).

1 Crystal Clear, Staff Attorney, represented the Union. Justice B. Dunn, Attorney at Law,
2 represented the District. Other persons present during the hearing included: Tom Kat, CSEA
3 Labor Relations Representative Member Intern; Jim Dandy, CSEA, Labor Relations
4 Representative; Sally Forth, District Personnel Director. Also present was a certified shorthand
5 reporter.
6
7
8
9

10 No jurisdictional issues were raised. Both the District and the Union were afforded a full and
11 complete opportunity to be heard, present evidence, and examine and cross-examine witnesses.
12 All witnesses testified under oath. The Parties agreed that they would file their post hearing
13 briefs with the Arbitrator thirty days, plus an additional five days for mailing, after receipt of the
14 transcript of the hearing. On June 3, 2005 the Arbitrator received the last brief.
15
16
17
18

19 Issues for Arbitration

20
21 Unable to agree on the issue(s), the Parties agreed that the Arbitrator, after receiving the
22 transcript, evidence and arguments, would determine the issues to be resolved in this arbitration.
23 The Arbitrator, after review of the record and briefs of the Parties, has framed the issues as
24 follows:
25

Issue 1

During the 2003 layoffs, was the District required by the terms of the contract to layoff the least senior employee in a classification where a position has been eliminated within the classification? If yes, what shall the remedy be?

Issue 2

During the 2003 layoffs, was the District required by the terms of the contract to allow an employee whose position was eliminated and who was therefore subject to layoff, to bump an incumbent employee with less seniority in a lower classification in which the laid-off employee had previously achieved permanence, when there are no vacancies in that lower classification? If yes, what shall the remedy be?

Pertinent Contract Provisions

The District and CSEA have a long term bargaining relationship under the Educational Employment Relations Act. The layoff and reemployment provisions in the July 1, 2002 through June 30, 2004 Contract, which is joint exhibit 1, are at issue in this arbitration. These provisions are substantially similar to the layoff and reemployment language found in the July 1, 1979 to June 30, 1982 contract. (UX 6) The same layoff and reemployment language is found in the July 1, 1998 through June 30, 1999 and July 1, 1999 through June 30, 2002 contracts. (UX 7&8) The record does not indicate when the current layoff and reemployment language was first negotiated.

Joint exhibit 1, Article VI: Definitions 6.1 (page 12) reads:

***"District Seniority"** is length of paid status in the District from the first day in paid status except for computing seniority for layoff. Summer school selection shall be determined seniority within appropriate classification. Seniority for layoff is determined by hours in paid status in the classification plus higher classification.*

Joint exhibit 1, Article XIV: Layoff And Reemployment (pages 34-36) reads:

***14.1** If it becomes necessary for the District to terminate the employment of any bargaining unit member because of a lack of work or lack of funds or expiration of specially funded programs, layoff procedures will be followed and a thirty (30) calendar days' notice shall be given to the bargaining unit member. The Board of Trustees will take action in public session in the form of a resolution or Board action. A termination interview with the Human Resources Department shall be scheduled during normal working hours.*

***14.2** The termination date of a bargaining unit member will be the last actual working day.*

14.3 Layoff Procedures:

1 *14.3.1 "Layoff" means a separation from the service of the District because of a lack of*
2 *work, lack of funds, or abolishment of a position.*

3
4
5 *14.3.2 Whenever because of lack of work or lack of funds, it becomes necessary to layoff*
6 *permanent or probationary bargaining unit members, such layoffs shall be conducted in*
7 *accordance with procedures set forth in Education Code 45298 and 45308. The names of*
8 *bargaining unit members laid off shall be placed on reemployment lists in the reverse*
9 *order of layoff and such eligibility shall continue for 39 months from the date of layoff.*

10
11
12
13 *14.3.3 No permanent or probationary classified bargaining unit member shall be laid off*
14 *from any position while employees serving under emergency, or short-term employment*
15 *are retained in positions of the same class.*

16
17
18
19 *14.3.4 Probationary and permanent bargaining unit members shall be notified in writing*
20 *at least 30 calendar days prior to the date of layoff and the notice shall contain the*
21 *reason therefore.*

22
23
24 *14.3.5 In lieu of layoff, a bargaining unit member may voluntarily consent to a reduction*
25 *in hours of employment, or to assignment to a class or grade lower than that in which the*
employee has achieved permanence, in order to avoid interruption of employment by
layoff.

14.3.5.1 To be considered for demotion in lieu of layoff, a bargaining unit
member must notify the Human Resources Department
in writing of such election not later than five (5) calendar days
after receiving notice of layoff.

14.3.5.2 Any bargaining unit member replaced by such demotion has the same
option of demotion afforded by this rule as if a position had been abolished or
discontinued.

14.3.5.3 Any bargaining unit member demoted pursuant to this rule shall receive
the maximum of the salary range in the class to which demoted provided that such

1 salary is not greater than the salary (s)he received in the higher, classification at
2 the time of demotion.
3

4
5 **14.3.5.4** In all cases where bargaining unit members accept demotion in lieu of
6 layoff, their names shall be placed on reemployment lists for the classes from
7 which they were demoted.
8

9
10 **14.4 Reemployment Rights:**
11

12
13 **14.4.1** Persons laid off because of lack of work or lack of funds are eligible to
14 reemployment for a period of 39 months and shall be reemployed in preference to
15 new applicants. In addition, such persons laid off have the right to participate in
16 promotional examinations within the district during the period of 39 months.
17

18
19 **14.4.2** Bargaining unit members who take voluntary demotions or voluntary
20 reductions in assigned time in lieu of layoff or to remain in their present positions
21 rather than be reclassified or reassigned, shall be granted the same rights as
22 persons laid off and shall retain eligibility to be considered for reemployment for
23 an additional period of up to 24 months provided that the same tests of fitness
24 under which they qualified for appointment to the class shall still apply.
25

14.4.3 Bargaining unit members who take voluntary demotions or voluntary
reductions in assigned time in lieu of layoff shall be, at the option of the
bargaining unit member, returned to a position in their former class or to
positions with increased assigned time as vacancies become available, and
without limitation of time, but if there is a valid reemployment list they shall be
ranked on that list, in accordance with their proper seniority.

14.4.4 A bargaining unit member on a reemployment list may decline three offers
of reemployment in the former class and status. After the third refusal, no
additional offers need be made and the bargaining unit member shall be
considered unavailable.

1 *14.4.5 Refusal of an offer of short-term or limited part-time employment, shall not*
2 *affect the standing of any bargaining unit member on a layoff list.*

3
4
5 *14.4.6 Bargaining unit members on reemployment lists shall be eligible to*
6 *compete in promotional examinations for which they qualify.*

7
8
9
10 **14.5 Seniority Rights:**

11
12 *Hours of service in the classification, plus higher classifications in the line of promotion,*
13 *shall count as seniority within the classification.*

14
15
16 Excerpt from California Education Code

17
18 **§45298.** *Persons laid off because of lack of work or lack of funds*
19 *are eligible to reemployment for a period of 39 months and shall be*
20 *reemployed in preference to new applicants. In addition, such*
21 *persons laid off have the right to participate in promotional*
22 *examinations within the district during the period of 39 months.*

23 *Employees who take voluntary demotions or voluntary reductions in*
24 *assigned time in lieu of layoff or to remain in their present*
25 *positions rather than be reclassified or reassigned, shall be granted*
 the same rights as persons laid off and shall retain eligibility to
 be considered for reemployment for an additional period of up to 24
 months; provided, that the same tests of fitness under which they
 qualified for appointment to the class shall still apply. The
 personnel commission shall make the determination of the specific
 period eligibility for reemployment on a class-by-class basis.

Employees who take voluntary demotions or voluntary reductions in
 assigned time in lieu of layoff shall be, at the option of the
 employee, returned to a position in their former class or to
 positions with increased assigned time as vacancies become available,
 and without limitation of time, but if there is a valid reemployment
 list they shall be ranked on that list in accordance with their proper
 seniority.

§45308. *Classified employees shall be subject to layoff for lack of*
 work or lack of funds. Whenever a classified employee is laid off,

1 the order of layoff within the class shall be determined by length of
2 service. The employee who has been employed the shortest time in
3 the class, plus higher classes, shall be laid off first.

4 Reemployment shall be in the reverse order of layoff.

5
6 For purposes of this section, in school districts with an average
7 daily attendance below 400,000, for service commencing or continuing
8 after July 1, 1971, "length of service" means all hours in paid
9 status, whether during the school year, a holiday, recess, or during
10 any period that a school is in session or closed, but does not
11 include any hours compensated solely on an overtime basis as provided
12 for in Section 45128. Nothing in this section shall preclude the
13 governing board of a school district from entering into an agreement
14 with the exclusive representative of the classified employees that
15 defines "length of service" to mean the hire date. For purposes of
16 this section, in school districts with an average daily attendance of
17 400,000 or more, for service commencing or continuing after January
18 1, 1986, "length of service" shall be determined by the date of hire.
19
20
21
22

23 If a governing board enters into an agreement with the exclusive
24 representative of classified employees that defines "length of
25 service" to mean the hire date, the governing board may define
"length of service" to mean the hire date for a classification of
employee not represented by any exclusive bargaining unit.

Nothing contained in this section shall preclude the granting of
"length of service" credit for time spent on unpaid illness leave,
unpaid maternity leave, unpaid family care leave, or unpaid
industrial accident leave. In addition, for military leave of
absence, "length of service" credit shall be granted pursuant to
Section 45297. In the event an employee returns to work following
any other unpaid leave of absence, no further seniority shall be
accrued for the time not worked.

"Hours in paid status" shall not be interpreted to mean any
service performed prior to entering into a probationary or permanent
status in the classified service of the district except service in
restricted positions as provided in this chapter.

Factual Background

During June 2003 the District gave layoff notices to approximately 113 classified employees represented by the CSEA. CSEA represents employees in two bargaining units identified as Unit-A General Classified and Unit-B Paraprofessional. This grievance arises under the contract covering Unit A, known as Chapter 821. Article XIV of the contract and California Education Code sections 45298 and 45308 governs layoff, including displacement rights and reemployment.

Seniority for layoff purposes is calculated by adding all hours worked in classification and higher classifications. During the layoff the District allowed employees to fill vacant positions in other classifications if they had previously served in that classification or met the minimum qualifications for the position. The District did not allow employees to use their seniority to bump or displace less senior employees in lower classifications even if the employee had previously obtained permanence in that classification.

Position of the Parties

Union

The Union contends that the clear and unambiguous language of the contract provides that an employee whose position is being eliminated due to layoff is entitled to displace or bump less senior employees in lower classifications previously held by the affected employee. The Union further contends the District had a consistent past practice of providing these bumping rights into lower classifications previously held by employees subject to layoff. According to the Union the District's official layoff policy includes these bumping rights. Additionally, the District's layoff notices refer to displacement rights, which imply a traditional right to bump less senior employees in lower classifications. The Union also asserts that employees have the right to be laid off in order of seniority within a classification, in which a position(s) has been eliminated, and that was not done in the case of R. B. Hind.

District

1 The District contends that there is nothing in the statutes, the collective
2 bargaining agreement, board policy, or past practice that require the
3 District to allow laid off employees to bump into previous classifications
4 they held when there are incumbents in those positions. The District further
5 contends that CSEA failed to meet its' burden of specifically naming
6 bargaining unit members directly affected by the dispute and that CSEA
7 presented new issues beyond the scope of the original grievance at
8 arbitration.
9

10 11 12 Analysis, Findings and Conclusions

13 In its' brief the District claims the Union did not communicate the issues
14 raised at arbitration while negotiating the effects of layoff or during the
15 grievance process. An examination of joint exhibits 2 through 34 and the
16 record shows that the union communicated their belief that employees affected
17 by layoff could, at the employee's option, use their seniority to bump or
18 displace less senior employees within class and in lower classifications in
19 which the employee has previously served, in lieu of layoff. Page two of the
20 initial written grievance describes the issues raised in the grievance. (UX
21 2) Thus the District had notice of the issues at arbitration. It is true that
22 the grievance document does not specifically name the grievant(s) as required
23 by Article XVIII of the contract. The Union would have obtained the names
24 from the District. Thus the District was not placed at a disadvantage. The
25 sole basis for denial of the grievance by the District on August 21, 2003
was, *"the District takes the position that we complied with the collective
bargaining agreement."* (JX 2) Thus the District failed to make timely
objection to the requirement to specifically name bargaining unit members
that qualify as grievants.

One of the positions eliminated during the 2003 layoff was a 12-month Typist
Clerk II occupied by R. B. Hind. He was placed in a vacant 10-month Typist
Clerk II position at Central High School¹. Another 12-month Clerk Typist II,
I. M. Lucky, with less seniority, was not laid off. Education Code section
45308, which is incorporated into the contract by reference, reads in
pertinent part, *"Whenever a classified employee is laid off, the order of
layoff within the class shall be determined by length of service. The*

¹ R. B. Hind was restored to a 12-month Clerk Typist II position after about
four months.

1 *employee who has been employed the shortest time in the class, plus higher*
2 *classes, shall be laid off first."* This clear and unambiguous language, as
3 applied in this situation, required the layoff of I. M. Lucky before R. B.
4 Hind. Then I. M. Lucky, instead of R. B. Hind, would have the option under
5 section 14.3.5 to voluntarily consent to a reduction of hours of employment
6 in order to avoid interruption of employment by layoff by accepting the 10-
7 month Clerk Typist II position at Central High School.
8
9

10
11 The central issue in this arbitration involves bumping rights into lower
12 classifications². The District correctly contends that for a bumping right to
13 exist it must be secured by the contract or Education Code sections 45298 and
14 45308. Education Code section 45308 states in pertinent part, "*Whenever a*
15 *classified employee is laid off, the order of layoff within the class shall*
16 *be determined by length of service. The employee who has been employed the*
17 *shortest time in the class, plus higher classes, shall be laid off first."* As
18 discussed above, the laid off employee has the right to use seniority to bump
19 a less senior employee within class. The question that divides the Parties
20 is, if the laid off employee had achieved permanence³ in a lower
21 classification, does that laid off employee have the contractual right to
22 bump a less senior employee in that lower classification? The Contract does
23 not expressly describe bumping or displacement rights.
24
25

If the right to bump to a another classification exists it is found in 14.3.5
of the Contract, which reads: "*In lieu of layoff, a bargaining unit member*
may voluntarily consent to a reduction in hours of employment, or to
assignment to a class or grade lower than that in which the employee has
achieved permanence, in order to avoid interruption of employment by layoff."
This language has resulted in conflicting interpretations by the Parties as
to whether or not an employee, that gained permanency in a lower
classification, has the right to bump to a less senior employee in that lower
classification.

² Bump or bumping is the term used during layoffs where an employee with
greater seniority has the right to displace an employee of lesser seniority.
(See Roberts' Dictionary of Industrial Relations By Harold S. Roberts, BNA)

³ Classified public school employees gain permanence in a classification after
completion of a probationary period at which time they gain a property
interest.

1 In any dispute over the interpretation and application of the provisions of a
2 collective bargaining agreement, the task of an arbitrator is to ascertain
3 and apply the mutual intent of the parties. It is well settled that the most
4 reliable indicator of mutual intent is the words used by the parties in their
5 labor agreement. When the terms of the disputed language are clear, the
6 arbitrator must give full effect to the meaning of those terms. If the
7 language is found ambiguous or susceptible to conflicting interpretations, as
8 in this case, the arbitrator will look to other common indicators, such as
9 construing the contract as a whole giving effect to all clauses and words and
10 past practice to ascertain the mutual intent of the parties.
11
12

13
14 Four sub-provisions modify 14.3.5⁴, including 14.3.5.2, which reads: "*Any*
15 *bargaining unit member **replaced** by such demotion has the same option of*
16 *demotion afforded by this rule as if a position had been abolished or*
17 *discontinued.*" (*Emphasis added*) If the District's interpretation is accepted
18 an employee consenting to an assignment in a lower class, in which they had
19 achieved permanence, could not replace an employee in that lower class. If
20 that is the case the language of 14.3.5.2 is meaningless. On the other hand,
21 the Union's interpretation gives meaning to 14.3.5.2 because employees that
22 demote into a lower classification would replace or bump employees with less
23 seniority. In selecting between two possible interpretations arbitrators
24 should choose the interpretation that prevents important language from
25 dropping out. If employees have no right to bump into a lower classification
where they had previously achieved permanence, then 14.3.5.2 serves no
purpose. When this language was negotiated it is assumed that the Parties
intended it to grant rights to employees replace or bumped by more senior
employees accepting demotion lieu of layoff.

14.3.5.2 harmonizes with the definition of seniority found in 14.5 and 6.1 of
the Contract. If employees only have the right to bump less senior employees
in their current classification at the time of layoff it is unnecessary to
include paid service in a higher classification in the calculation of
seniority. Employees with bumping rights to previously held positions in a
lower classification would need seniority earned in higher classifications to
replace less senior employees. 14.5 and 6.1 complements the interpretation
that employees, who have achieved permanence in a lower classification, have

⁴ Sub-provision 14.3.5.1 is not used because a District representative meets
with all employees affected by layoff and explains their options.

1 the right to bump less senior employees in that lower classification. The
2 mutual intent of the Parties is, that during a layoff, more senior employees
3 are retained while less senior employees are laid off. Allowing employees to
4 use seniority earned in class and higher classifications to elect demotion to
5 a class, in which they previously achieved permanence, and bump or replace
6 less senior employees, accomplishes this.
7

8
9 An examination of past practice sheds additional light on the mutual intent
10 of the Parties at the time they negotiated the contract language at issue.
11 Ida B. Gone retired in January 2000 after 41 years of District service. From
12 approximately 1982 until her retirement she held various positions in
13 Personnel Services. For a period of time, although she could not recall dates
14 or number of years, on behalf of the District she prepared seniority list,
15 met with employees affected to layoff and discussed their rights and placed
16 employees based seniority. She further testified that sometimes layoff
17 occurred on consecutive years and sometimes it did not. Gone creditably
18 testified that her normal procedure was to allow employees subject to layoff
19 to bump down into a lower classification in which the employee to be laid off
20 had previously worked and replace an employee with less seniority. Lower
21 classification was one on a lower salary range. Gone's testimony is supported
22 by District documents prepared in support of layoffs in 1998-99 (UX 1&2).
23 Those documents clearly show employees, if they previously worked in a lower
24 classification, were given the right to bump to that lower classification and
25 replace an employee with less seniority.

Ann Ifull testified that she has been employed by the Union for approximately
twenty years. She was the CSEA Labor Relations Representative assigned to
work with Gone during the 1999 layoffs. She creditably testified that
employees that had greater seniority in a lower classification could bump the
least senior person in that lower classification. The Union's past practice
contention is further supported by the testimony of Mel Larkey. Larkey worked
eleven years for the District, as Senior Computer Operator, retiring in
December 2000. During his District employment Larkey held various Union
offices, including Chief Job Steward from 1994 to 1999. In his role as Chief
Job Steward he accompanied employees subject to layoff to exit interviews
with Gone. In his job as Senior Computer Operator Larkey prepared employee
seniority list for Gone. He creditably testified that the District allowed

1 employees, who had previously worked in a lower classification, to bump less
2 senior employees in that lower classification.

3
4 Board Policy AR 4217.3 entitled Classified Employee Layoff/Rehire further
5 supports the Union's interpretation of bumping rights. On page four in
6 pertinent Part it provides, "A laid-off employee, when reemployed, will be
7 place on the salary step held at time of layoff. An employee who bumped into
8 a lower class will, when reinstated to the previous class, be placed on the
9 salary step to which he/she would have progressed had he/she remained there."

10 (UX 5)

11
12
13 The District's first witness was Sally Forth, Personnel Director, hired in
14 April 2001. She took on most, if not all, of Gone's responsibilities for
15 classified employee layoffs. During the 2001 she "was more of an observer" of
16 the layoff process. Forth handled the 2003 layoffs, which is at issue in this
17 arbitration. She testified that employees subject to layoff were allowed to
18 bump less senior employees in the current classification, but not in
19 different classifications. They were placed in different classifications if
20 there was a vacancy. Next to testify was Frank N. Fair. He was hired in 1999
21 as Assistant Director of Personnel and later promoted to Labor Relations
22 Director. He testified that in 1999 the District sought to upgrade security
23 on school campuses that included replacing a classification of Student
24 Liaison with Campus Security Monitor. The negotiation with CSEA on
25 implementation of the new classification resulted in impasse. Following
factfinding the District unilaterally implementing its' last, best and final
offer. (DX 1) That action resulted in the layoff of eighteen Student Liaisons
unable to qualify as Campus Security Monitor. Fair testified they were not
allowed to bump less senior employees in classifications in which they
previously worked. During cross-examination the Union introduced the
Factfinding Report. (UX 9) Under the heading "District Position" the
Factfinding Report states on page six, "Each current Student Liaison will be
given all layoff and bumping rights pursuant to the Collective Bargaining
Agreement. Based on current information, approximately five current Student
Liaison have bumping rights into other classified positions." District Panel
Member, I. M. Partial, signed the Factfinding Report. (UX 9)

The precise longevity of the practice of allowing employees subject to
layoff, who previously achieved permanence in a lower classification, to use

1 their seniority to bump employees with less seniority in that lower
2 classification cannot be determined from the record. The Union proved that
3 the practice existed under the same contract language found in previous
4 contracts for at least eleven years. It is a well established principal of
5 labor arbitration that where a past practice has established a meaning for
6 language in previous contracts and is used in subsequent contracts it is
7 presumed that the language will have meaning given to it by past practice.
8 This practice gives effect and meaning to all provisions of the Article XIV,
9 including 14.3.5.2. Thus the Arbitrator finds that the mutual intent of the
10 Parties allows employees subject to layoff, who previously achieved
11 permanency in a lower classification, may voluntarily use their seniority to
12 bump incumbent employees in that lower classification with less seniority.
13
14
15
16
17

18 Award

19 Having heard or read and carefully reviewed the transcript, evidence and
20 briefs in this case and in light of the above findings, analysis and
21 conclusions, the Arbitrator finds as follows:
22

- 23 1. The grievance is sustained.
- 24 2. R. B. Hind shall be paid the difference between what he earned in a 10-
25 month Clerk Typist II position and what he would have earned in a 12-
month Clerk Typist II position, if any.
3. Using June 2003 seniority, laid off employees may voluntarily consent
to an assignment in a lower classification in which they previously
achieved permanency and replace an employee with less seniority.
4. The District shall pay employees that consent to demotion; back pay
lost, if any, from date of layoff to time of assignment to the lower
classification or restoration to the classification from which layoff
occurred.

The Arbitrator retains jurisdiction over this grievance for forty-five days
to resolve disputes in implementation of the remedy, if any.

Dated: June 7, 2005 at Crestline, California

Joseph J. Woodford, Arbitrator